



LEGAL AND JUDICIAL PROBLEMS FOR DIVORCE ACCORDING TO ALGERIAN LAW

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ABSTRACT

Divorce is the dissolution of the marital bond between the parties, and it is either retroactive or irrevocable with minor or major evidence. It is one of the most frequently raised issues before the judiciary and raises many problems, the most important of which is the issue of proving divorce, especially with the ambiguity surrounding some of the articles that the legislator singled out for the issue of divorce and the difficulty of applying it judicially.

However, it is shrouded in some ambiguity, especially with the existence of Article 49 of the Family Code, which considers that divorce can only be established by a ruling. Is the judgment in this case considered revealing or decided?

Also, once a divorce from the husband occurs, its effects are achieved by dissolving the marital bond and the wife's waiting period. This is from a legal point of view, but this contradicts what is stated in the legal texts. What are the procedures, if any?

INTRODUCTION

Marriage is considered sacred, which is why it was called the heavy charter, as it was surrounded by a set of legal rules that guarantee its continuity and stability. Nevertheless, an exception is represented in divorce, which solves the disintegrated marital ties through which it is difficult to form a healthy family.

However, divorce is the most hated halal to Allah Almighty. Yet, it has been legislated and regulated by provisions that the husband must observe for the divorce to take place in a valid manner that is positive for its legal and legal effects.

Divorce is the dissolution and dissolution of the marriage bond, as it is defined legally as “lifting the restriction of marriage immediately or in the future with a term derived from the article of divorce or its meaning”¹

Article 48 of the Family Code² defines divorce according to the cases taken by the latter, stating: “[...] A marriage contract shall be dissolved by divorce concluded by the will of the husband or by the consent of the spouses or at the request of the wife within the limits of Articles 53 and 54 of this Law”.³

It is evident from the legal concept that divorce is a dissolution of the marital bond using one of the words that indicate it, and it can take place by the will of the husband, at the wife's request or by mutual consent.

But what interests us in this study is the divorce that takes place by the will of the husband, in which the judge has a negative role that is sufficient to verify the husband's will and its validity to rule to prove this will and does not intervene except if it comes to reconciliation.

However, if we look at the text of Article 49 of the Family Code⁴ which states: “Divorce shall not be established except by a judgment after several attempts at reconciliation conducted by the judge,

but its period does not exceed three months from the date of filing the lawsuit [...]”.

However, it is shrouded in some ambiguity, especially with the existence of Article 49 of the Family Code, which considers that divorce can only be established by a ruling. Is the judgment in this case considered revealing or decided?

Also, once a divorce from the husband occurs, its effects are achieved by dissolving the marital bond and the wife's waiting period. This is from a legal point of view, but this contradicts what is stated in the legal texts. What are the procedures, if any?

To answer these questions, we will divide this study into two sections, the first of which deals with how to prove divorce, and the second section the procedures for proving divorce in accordance with the provisions of the Algerian Family Code.

1. HOW TO PROVE A DIVORCE

Divorce is the dissolution of the marital bond by the will of the husband or the lifting of the marriage restriction at the husband's rhythm, and divorce does not take place except in the form prescribed by Sharia.⁵

However, looking at the aforementioned Article 49 of the Criminal Code, we find that the legislator has submitted the issue of proof of divorce to the judiciary, but what is problematic is that divorce takes place outside the court and must be proved by a court ruling.

In this regard, the legislator began the article with the phrase, “It does not prove, and divorce is not held, so we wonder whether the judicial ruling, in this case, is a means of proving divorce, or is it a formal condition in which divorce occurs?”

In view of article 48 of the Penal Code, it is explicitly stated that the dissolution of the marital union may occur as a first case by the husband's sole will and as soon as he utters the word divorce or what benefits him. However, article 49 of the Code deprives the husband of the freedom granted to him by Article 48 of the Code by restricting filing a lawsuit demanding the dissolution of the

1 Abu Zahra, M., (2016). Personal Status. Dar Al-Fikr Al-Arabi, Cairo, p. 279.

2 The Family Code. (June 9, 1984). G.R. No. 24 of June 12, 1984, amending and supplementing. <http://jafbase.fr/docMaghreb/Algeriecode_famille.pdf> [30.07.2023].

3 This Article was amended by Ordinance 05-02 of February 27, 2005, G.R. No. 15 of February 27, 2005.

4 This Article was amended by Ordinance 05-02 of February 27, 2005, G.R. No. 15 of February 27, 2005.

5 Ahmed, I. A. H., Al-N. (1996). Women's Rights in Islamic Law. Dar Al-Thaqafa Library for Publishing and Distribution, p. 143.

marital bond by the judiciary and subjecting him to attempts at reconciliation established by a record. Consequently, this legal article affirms that customary divorce outside the courts' walls is not recognized.

Unlike the Egyptian legislation, which recognizes the occurrence of divorce outside the walls of the judiciary, where it can be proven by all means of proof such as evidence, oath and acknowledgment.⁶

Article 50 A⁷ adds and makes the matter ambiguous when the legislator did not differentiate between retroactive divorce and definitive divorce, as the article stated that whoever visits his wife during the reconciliation does not need a new contract, while the one who reviews it after the issuance of the divorce judgment is the one who needs a new contract. In this case, does the legislator not recognize retroactive divorce, and what is the fate of the shot that occurred and led in the end and after filing the lawsuit to reconciliation?

According to Dr. Zoda Omar, divorce can only be done by a ruling, and revocation that takes place before the judge issues a divorce ruling does not fall within the concept of revocation related to retroactive divorce.⁸ Article 49 restricts Article 50 of the Code of Criminal Justice to the need for a judgment to prove the occurrence of divorce.

This article also raises another issue related to the waiting period, which, if we look closer, we find has become double so that the wife is considered when the divorce from the husband occurs twice, once when the divorce occurs, which is the legal waiting period, and again when the judgment is issued, which is the legal waiting period.

In this regard, the judiciary affirms that: "Divorce is only a statement of the unilateral will of the husband to put an end to marital life, and the trial judges, when it is proven, can only testify and declare it [...]"⁹

Also: "It is prescribed by Sharia and according to what has been done by the Supreme Council that the husband's utterance of divorce obliges him [...]"¹⁰

This means that divorce becomes binding as soon as the husband utters it, while a judicial ruling only proves it because of its implications.

The legislator has restricted the husband's right to divorce even though it is a voluntary right and subjected him to the need to obtain a judicial ruling, and therefore, the will of the husband stands unable to arrange its legal effects unless it meets the conditions required by law, which is the existence of the form required by the legislator by issuing a judicial ruling proving this will.¹¹

However, Dr. Omar Zoda considers that the affirmation of a divorce judgment is a condition for convening and not for proof since the legislator when stipulating the need to have a judgment to prove divorce, meant that there is no divorce unless attempts at reconciliation precede it. Consequently, the husband must declare his will to divorce before the judge after the reconciliation proceedings have been completed, and therefore, the judge is considered a witness to this. On this basis, the judicial judgment is considered a condition for the validity of the divorce and not a condition of proof.¹²

Accordingly, according to this view, the legislator has been in line with the jurisprudence of Islamic law regarding the need to witness divorce with two witnesses.

2. PROCEDURES FOR PROVING A DIVORCE

Under Article 48 of the Family Code, a judicial ruling is considered a means or condition for divorce, without which the law does not recognize the existence of divorce.

6 Al-Bakri, M. A. (1996). Encyclopedia of Jurisprudence and the Judiciary in Personal Status. Dar Mahmoud for Publishing and Distribution, p. 183.

7 Article 50 of the Code states: "Whoever visits his wife during the reconciliation attempt does not need a new contract, and whoever returns to her after the divorce judgment is issued needs a new contract".

8 Zoda, O. (2003). The Nature of the Judgments Terminating the Marital Bond and the Effect of Appealing It. Exclidea Publications Algeria, p. 32.

9 Supreme Court, Civil Chamber, 27/03/1968. Annual Bul-

letin 1968, p. 106, quoted in: Al-Arabi, B. (1994). Family Law, Principles of Jurisprudence According to the Decisions of the Supreme Court. University Publications Office Algeria, p. 58.

10 Supreme Court, Personal Status Chamber, 17/12/1984, file No. 35322, Judicial Journal 1984, No. 4, p. 91, quoted by: Al-Arabi, B. Previous reference, p. 73.

11 Zoda, O. Previous reference, p. 107.

12 Ibid, p. 31.

The judicial ruling for divorce is characterized as a prescribed ruling, according to which the judge reveals the divorce that occurred at the will of the husband before resorting to the judiciary. The establishment of new legal centres represented the divorced and divorced after they were married, and therefore, the divorce judgment is a prescribed and established ruling. In this case, it is characterized by the following:

- Its content includes the obligation to respect what has been decreed and the need to implement what it says.
- As an official paper, it must be in writing.
- It is issued by a judicial body whose rulings are characterized by legitimacy.¹³

Therefore, a divorce lawsuit is filed by an interested person by resorting to the competent court¹⁴ accompanied by a petition stating all the necessary information, facts and reasons for the divorce, with the husband's signature at the end.

However, problems can occur if there are symptoms that prevent the plaintiff from completing the judicial litigation, such as the court cancelling the lawsuit due to the plaintiff's absence from the hearing despite the correct notification, the plaintiff leaving the litigation, or the lawsuit dropping. In reality, all these cases are divorced, but it is impossible to prove it under a judicial ruling. Therefore, a solution must be found to these problems that lead to the loss of the rights of the defendant party from a legal and legal point of view.

Therefore, we believe the divorce should be documented immediately after its occurrence by each interested party and by those who claim to prove the opposite.

Article 49 of the Family Law also shows that there must be reconciliation procedures after applying to the judiciary to prove divorce. Are they considered and mentioned within the ruling of reconciliation? Or it is ignored. If it is ignored, what is the fate of that relationship from a legal point of view?

Reconciliation is considered an essential and compulsory procedure before the divorce is issued.

Still, it is useless if the divorce takes place outside the court framework, and the parties contact the court only to prove the fact of divorce in an official capacity. Especially if it happens, for example, if a man divorces his wife outside the court and resorts to the latter to prove the divorce and the reconciliation was made, and he divorced her again, and the reconciliation was made, and he divorced her again, and the reconciliation was made, does the judge, in this case, solve it forbidden by reconciling them or does he calculate the previous three shots and sign the divorce and the wife shows him a major statement and is not permissible for him after that except by marrying another and divorcing her or dying for her.¹⁵

However, if the judge reconciles several times and this is not done, he must prove this using a record signed by the parties, the registrar and the judge, with a parallel public hearing to pronounce the divorce ruling.¹⁶

The role of the Public Prosecution was also activated after the amendment of Article 49 of the Family Law, so it seeks to register the divorce judgment in the civil status records obligatorily, without a request from one of the parties, as a legitimate representative of society.¹⁷

CONCLUSION

Finally, we conclude that the legislator did not recognize extrajudicial divorce, although the articles suggest otherwise. The legislator did not explicitly distinguish between retroactive divorce and irrevocable divorce. Although he did so in Article 51 of the Law when he distinguished between divorce with a minor intention and a divorce with minor evidence, this is when he stated that a husband cannot return to his divorced wife three times in a

13 Ma'amir, H. (2013). Proof of divorce between law and the judiciary. *Al-Haqiqa Magazine* (27), pp.134-166.

14 Article 8 of the C.E.M.E.D. stipulates: "Applications relating to claims for divorce or return to the marital home shall be filed before the court within whose jurisdiction the marital home is located".

15 Ma'amir, H. Previous reference, p. 159, Article 51 of the Penal Code stipulates: "A man cannot return to a person who divorces her three times in a row until she marries another person and divorces him or dies from her after construction".

16 See Articles 37 and 144 of the Code of Civil and Administrative Procedure.

17 Previously, the parties were in charge of the process of registering the judgment after possessing the authority of the res judicata in the civil status records, but now the matter is entrusted to the Public Prosecution, see: Ma'amir, H. Previous reference, p. 161.

row until she marries another person and divorces him or dies from her after construction.

Articles 48, 49 and 50 of the Family Code have sought to give the divorce ruling an official form even though these articles affect the provisions of Islamic law in several respects:

- Divorce is a major effect of the marital bond;
- The issue of divorce is one of the most serious issues affecting society, and that affects it negatively, as it leads to the dispersion of the family and its collapse and the beginning of the loss of children who will grow up in an inappropriate environment that affects their psychology, which leads them to deviation in the future;
- Divorce is a man's exclusive right to Algeria, as marital infallibility is in his hands, so the husband must make good use of this right for extreme necessity and seek to follow the procedures stipulated in the law to guarantee the rights and the legal effects of divorce;
- The legislator's goal through Article 49 is to narrow the cases of divorce and to preserve the cohesion of the family and the children;
- The legislator obliges the judge to attempt reconciliation between the spouses, as it is an essential procedure in divorce before deciding on the case;
- The Algerian legislator omits divorce outside the judiciary despite its recognition by jurisprudence;
- The absence of a procedural law on personal status has led to many problems in the field of application;
- The Code of Civil and Administrative Procedure is the procedural reference for divorce cases;
- Referral from the legislator to the provisions and principles of Islamic jurisprudence and the opinions of jurists in complex divorce matters, in accordance with Article 222 of Law 11/84 as amended and supplemented;
- Incompatibility of the family law with the requirements of Islamic law;
- The Algerian legislator does not recognize divorce outside the judiciary through its stipulation in Article 49 of the Algerian Family Code that divorce can only be proven by a ruling. Therefore, the husband must declare the divorce before the judge. The legislator's silence on customary divorce created serious problems, especially if the waiting period expires, and thus, the divorce becomes a major manifestation and its consequences;
- Despite the legislator's silence on customary divorce, judicial applications work by proving it retroactively from the day it was uttered by the husband after confirming the validity of the divorce by the testimony of witnesses;
- The irrational formulation of the legal texts that regulate divorce, especially Articles 49, 50, and 51, compared to the provisions of Islamic Sharia;
- The legislator omits and does not refer to the issue of witnessing divorce because witnessing has many benefits that limit the use of the right to divorce, especially the fanatic husband who is hasty in divorcing his wife;
- The terrible increase in divorce rates is due to the absence of religious scruples of people and their ignorance of the seriousness of this procedure, so the Algerian family has become fragile and rapidly collapsing, which will necessarily lead to a lack of cohesion in society;
- The judge makes an effort to apply the law and the provisions of Islamic law in the matter of proving divorce. Still, his conviction remains relative, especially in the case of denial by the husband of the occurrence of a divorce. Therefore, the spouses must be more careful than the judge when applying their religion and what Islamic law stipulates.

Therefore, we call on the legislator to change the method of proving the divorce ruling, which has become a violation of the provisions of Islamic law, and this is a Muslim country. For this, we propose the following:

- Witnessing the divorce for those who want to divorce, and this is so that the shots that occurred without applying to the court are counted. Therefore, the court is resorted to in this case only for the sake of proof, and

in this way maintaining the provisions of Islamic law;

- Delete the article related to proof because it violates the provisions of Islamic law and limits the proof of divorce to documenting it, with penalties if the divorcee does not do so. Adding articles within the family law protects the injured party in the event of failure to document the divorce, especially since manipulation in such matters seriously affects the family and society alike and falls into haram;
- Determining the duration of the beginning of the waiting period accurately, and this is

because there is a difference between divorce located outside the walls of the judiciary and divorce before the court, and this is not to create legal problems.

In the end, we say that although divorce is the right of the husband to sign, the legislator must regulate it with tight legal rules that prevent manipulation of it, as it is the most hated halal to Allah Almighty. Its occurrence leads to dismantling of family ties, considered the basis of society. Insufficient regulation and lack of clarity of legal texts lead to the loss of rights, especially the rights of the child who is considered a victim of divorce.

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